No. 81-43

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNIE RAY ODOM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of
North Carolina

John R. B. Matthis
Special Deputy Attorney General
COUNSEL FOR RESPONDENT
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741

Philip A. Telfer
Associate Attorney General

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

INDEX

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Question Presented 3

Statement of the Case 3

Argument:

NEITHER PETITIONER'S RIGHT TO COUNSEL NOR HER DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S ADMISSION OF TESTIMONY REGARDING HER REFUSAL TO SUBMIT TO A GUNSHOT RESIDUE TEST 5

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct 2240, 48 L.Ed.2d. (1976) 6,7

Gilbert v. California, 388 U.S. 263, 87 S.Ct 1951, 18 L.Ed.2d 1178 (1967) 6

Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) 7

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 6

United States v. Wade, 338 U.S., 87 S.Ct. 1926, 18 L.Ed.3d 1149 (1967) 6

No. 81-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNIE RAY ODOM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the North Carolina Supreme Court is reported at 303 N.C. 163, 277 S.E.2d 352 (1981). The opinion of the North Carolina Court of Apeals is reported at 49 N.C App. 278, 271 S.E.2d 98 (1980). Copies of the opinions of the North Carolina Supreme Court and Court of Appeals are appended to the Petition. (Pet. Br. 10-34).

JURISDICTION

Petitioners allege jurisdiction pursuant to U.S. Sup. Ct. R. 17.1 (c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

U.S. Constitution, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

DID THE TESTIMONY ADMITTED BY THE TRIAL COURT REGARDING DEFENDANT'S REFUSAL TO SUBMIT TO A GUNSHOT RESIDUE TEST (THE PARAFFIN TEST) VIOLATE HER CONSTITUTIONAL RIGHTS TO COUNSEL AND DUE PROCESS OF LAW?

STATEMENT OF THE CASE

On March 16, 1981 Defendant was arrested for shooting Robert Lee Moore and was charged with assault with intent to kill, inflicting serious bodily injury. Defendant was informed by the arresting officers of her *Miranda* rights and signed a written waiver of them. In response to the officers' questions, Defendant conceded that she knew something about a fight in which she and the victim were involved earlier in the day, but denied any knowledge of the shooting. She informed the officers at this point that she wished to consult with counsel and questioning ceased.

Defendant was taken before a magistrate and there was asked to take a gunshot residue test. A crime scene technician explained to the Defendant that the test would show whether she had recently fired a weapon. Defendant refused to take the test. The technician then

told her that she did not have to take the test, and the test was never administered.

At trial two eyewitnesses, including the victim, testified that the Defendant shot Robert Lee Moore. Defendant testified she had seen the victim on the day in question, at the scene of the shooting, but that no one was shot while she was there. She further testified that she owned a gun which she had placed in her daughter's car that morning when she drove it, that the car was at the scene of the shooting, and that she first discovered the gun missing when the police searched the car.

On cross-examination Defendant testified, over objection, that she had refused to take the paraffin test until she talked to her attorney. The crime scene technician who had explained the test to the Defendant testified as a rebuttal witness, over objection, concerning Defendant's refusal to take the test. The technician confirmed that the Defendant had refused to take the paraffin test, but stated he did not recall Defendant giving any reason for the refusal.

The jury found the Defendant guilty and she was sentenced to a term of five to seven years. Petitioner appealed her conviction and was awarded a new trial by the North Carolina Court of Appeals. The Supreme Court of North Carolina reversed, finding no Consitutional violation.

ARGUMENT

NEITHER PETITIONER'S RIGHT TO COUNSEL NOR HER DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S ADMISSION OF TESTIMONY REGARDING HER REFUSAL TO SUBMIT TO A GUNSHOT RESIDUE TEST.

Petitioner had no right to the presence of counsel during the administration of a gunshot residue test. As there was no Constitutional right violated by the State's request that the Defendant take such a test, there is no due process violation in the admission of testimony regarding such refusal.

The rulings of this Court make it clear that Petitioner had no right to counsel during the administering of a gunshot residue test. As the North Carolina Supreme Court pointed out in its opinion, the right to counsel:

> attaches only to "critical' stages of the proceedings, those when the presence of counsel is necessary to assure a meaningful defense. *United States v. Wade*, 338 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on "whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 227, 87 S.Ct. at 1932, 18 L.Ed.2d at 1157.

303 N.C. at 166, 277 S.E.2d at 355, Pet. Br. at 28-29.

This Court's decisions establish that the conduct of scientific tests which result in non-testimonial evidence against the Defendant are not "critical stages" in the proceedings to which the right to counsel would attach. *Wade*,338 U.S. at 227, 87 S.Ct. at 1932-33, 18 L.Ed.2d. at 1158; *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d. 908 (1966). Clearly, then, since Defendant's right to counsel would not have been violated by the State's administering of a paraffin test, no violation of that right could have been committed in the *request* to take such a test. Thus, any reliance of Petitioner on the right to counsel in refusing to take the test was misplaced; no such Constitutional right exists and no governmental official had informed her or led her to believe that it did.

Petitioner, nonetheless, asserts that admission of testimony regarding refusal to take a gunshot residue test was fundamentally unfair and violated her Fourteenth Amendment due process rights. In support of her position, Petitioner relies on this Court's opinion in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d. 91 (1976). *Doyle* is inapposite.

In *Doyle* this Court held that where Petitioners had failed to relate to the arresting officers their exculpatory story after *Miranda* warnings had been given, but first raised that defense at trial, the trial court's allowance of cross-examination concerning their silence following arrest was fundamentally unfair and in violation of the due process clause of the Fourteenth Amendment. In the Court's view, allowance of cross-examination concerning post-arrest silence would result in the

chilling of a defendant's exercise of Constitutional rights. This was true, the Court stated, despite the fact that the *Doyle* defendants had not asserted that their silence was based on the *Miranda* rights which had been read to them.

Petitioner in the case at bar asks this Court to extend *Doyle* to a situation where she had neither a Constitutional right to counsel nor to refuse to submit to the paraffin test. More on point than *Doyle* to the present case is *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). In *Jenkins* this Court held that cross-examination of a Defendant concerning pre-arrest silence did not amount to fundamental unfairness in violation of Defendant's due process rights. This Court distinguished *Doyle* on the basis that no Constitutional right to remain silent had attached prior to the arrest.

> In this case, no governmental action induced Petitioner to remain silent before arrest. The failure to speak occurred before the Petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of pre-arrest silence does not violate the Fourteenth Amendment.

447 U.S. at 240, 100 S.Ct. at 2130, 65 L.Ed2d. at 96.

As Petitioner neither had nor was led to believe that she had either the right to refuse to take the gunshot residue test or the right to have counsel present during the administration of such a test, there was no fundamental unfairness in the trial court's admission of testimony concerning Petitioner's refusal to take such a test.

CONCLUSION

Based on the foregoing, the Resondent prays that the writ of certiorari be denied.

This the 20th day of October, 1981.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

John R. B. Matthis
Special Deputy Attorney General
Counsel for Respondent
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741

Philip A. Telfer
Associate Attorney General

CERTIFICATE OF SERVICE

This is to certify that the foregoing Response to Petition for Discretionary Review was served upon the Defendant by placing three copies of said Response to Petition for Discretionary Review in The United States post Office at Raleigh, North Carolina, with first class postage prepaid and addressed to:

Seavy A. Carroll
115 South Cool Spring Street
Fayetteville, North Carolina 28301

This the 20th day of October, 1981.

John R. B. Matthis
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741